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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1140 Misc.

THOMAS F. KENNEY,
Petitioner,

vs.

CHARLES H. HAUGH, Warden, Iowa Men's Reformatory, Anamosa, Iowa,
Respondent.

BRIEF FOR THE RESPONDENT IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

RICHARD C. TURNER
Attorney General, State of Iowa
Des Moines, Iowa

DAVID A. ELDERKIN
WILLIAM A. CLAERHOUT
Assistant Attorneys General, State of Iowa
Des Moines, Iowa
Attorneys for Respondent

E. L. MERSEREAU, INC., 926 Cherry Street, Kansas City, Mo. 64106. HArrison 1-8020

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CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Iowa is reported in 163 N.W.2d 428. The opinion of the District Court of Iowa is unreported.

JURISDICTION

The petitioner claims jurisdiction of this Court under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether this Court's decision in *Entsminger* v. *State of Iowa,* 386 U.S. 748 (1967), which was entered May 8, 1967, applies to a State criminal appeal decided January 12, 1965.

STATEMENT OF THE CASE

On January 12, 1965, the Supreme Court of Iowa affirmed Petitioner's conviction for burglary on a "clerk's transcript" appeal, which did not include consideration of the trial evidence or briefs and arguments on behalf of the petitioner. The court appointed attorney prosecuted the appeal without the knowledge and consent of petitioner. *Kenney* v. *Haugh,* ..... Iowa ....., 163 N.W.2d 428.

In September, 1966, petitioner filed a petition for writ of habeas corpus in the District Court of Iowa, claiming violation of due process in the manner in which his appeal was submitted. The court annulled the writ after hearing and remanded petitioner to the custody of the respondent. On appeal, the Supreme Court of Iowa affirmed the lower court's denial. *Kenney* v. *Haugh,* supra.

REASONS WHY THE WRIT SHOULD BE DENIED

The Supreme Court of Iowa has decided the question of retroactive application of *Entsminger* v. *State of Iowa,* 386 U.S. 748 (1967), to petitioner's case consonant with the principles established by this Court.

The retroactivity or nonretroactivity of a rule is not determined by the provision of the Constitution upon which it is based. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). The Constitution neither requires nor prohibits retroactive application of newly found constitutional rules. *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

The determination of retroactivity includes consideration of "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U.S. 293 (1967).

The most compelling criterion in the instant case is the effect a retroactive application of the *Entsminger* decision would have on the administration of justice in Iowa. A review of the reported appellate decisions based on a "clerk's transcript," shows more than 120 such appeals, merely in the four years preceding this Court's ruling in *Entsminger*. Assuming the clerk's transcript method was no less popular in earlier years, the opportunity of reviving such a volume of appeals would necessarily work a hardship on the Iowa Supreme Court. And, should any retrials result, the greatest benefit would go to those serving the longest sentences. *Tehan* v. *Shott*, 382 U.S. 406 (1966).

Moreover, it would appear that the Iowa Supreme Court decision below provides the most reasonable cut-off point, the date of the *Entsminger* decision (May 8, 1967), for denying application of the previously unpronounced rule of Constitutional law. It should not be assumed that the States were knowingly maintaining an unconstitutional method of appeal before *Entsminger* and *Anders* v. *California*, 386 U.S. 738 (1967).

A State is not Constitutionally obliged to provide appellate review of criminal cases, but if it does there may be no discrimination based on indigency. *Burns* v. *Ohio,* 360 U.S. 252 (1959). The cut-off date recognized by the Iowa Supreme Court in no way distinguishes between the rich and the poor. If there are any assumptions available herein one should be that most convicted persons who used the "clerk's transcript" appeal did so because their attorneys could find no substantial error upon which to argue an appeal. Even then, the Supreme Court occasionally ferreted out an overlooked flaw, e.g. *State* v. *Williams,* 123 N.W.2d 406; *State* v. *Dreessen,* 141 N.W.2d 917; *State* v. *Kamerling,* 143 N.W.2d 359. The danger in retroactive application of *Entsminger* is not in the possibility that some prisoner might win a retrial, but in the scores who would probably try.

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa
DAVID A. ELDERKIN
WILLIAM A. CLAERHOUT
Assistant Attorneys General
State House
Des Moines, Iowa
Attorneys for Respondent